



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 210901-0173]

Swim with and Approach Regulation for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act; Ratification of Regulation

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Ratification.

SUMMARY: NOAA is publishing notification of the NOAA Administrator's ratification of a rule.

DATES: The ratification was signed on July 8, 2022.

FOR FURTHER INFORMATION CONTACT: Kevin Brindock, NMFS, Pacific Islands Region, Deputy Assistant Regional Administrator, Protected Resources Division, (808) 725-5146; or Trevor Spradlin, NMFS, Office of Protected Resources, Deputy Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, (301) 427-8402.

SUPPLEMENTARY INFORMATION: On July 8, 2022, the Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator, Dr. Richard W. Spinrad, ratified a final rule issued by NMFS on September 28, 2021, that restricts swimming with and approaching Hawaiian spinner dolphins within 50 yards (45.7 m) in designated waters of Hawaii, subject to certain exceptions. See Swim With and

Approach Regulation for Hawaiian Spinner Dolphins under the Marine Mammal Protection Act, 86 FR 53818 (Sept. 28, 2021) (Approach Rule). NOAA is now publishing the ratification in the **Federal Register** out of an abundance of caution. Neither the ratification nor the publication is a statement that the ratified action would be invalid absent the ratification, whether published or otherwise.

APPENDIX

Ratification

I, Richard W. Spinrad, hereby declare as follows:

As the Under Secretary of Commerce for Oceans and Atmosphere and the National Oceanic and Atmospheric Administration (NOAA) Administrator, I am affirming and ratifying a prior action by the Assistant Administrator for NOAA Fisheries, Janet Coit. On September 28, 2021, the National Marine Fisheries Service (NMFS or NOAA Fisheries) published in the **Federal Register** a final rule that restricts swimming with and approaching Hawaiian spinner dolphins within 50 yards (45.7 m) in designated coastal waters of Hawaii, subject to designated exceptions. See Swim With and Approach Regulation for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act, 86 FR 53818 (Sept. 28, 2021) (Approach Rule). The Approach Rule was approved by the Assistant Administrator for NOAA Fisheries, Janet Coit, and signed by the Deputy Assistant Administrator for NOAA Fisheries, Samuel Rauch. Questions have been raised in litigation concerning the authority of these officials to issue the Approach Rule.

I have the authority to ratify the Approach Rule. President Biden appointed me to the position of Under Secretary of Commerce for Oceans and Atmosphere and NOAA

Administrator on April 22, 2021, and the Senate confirmed my appointment on June 17, 2021. I was sworn in to office on June 22, 2021. In my capacity as NOAA Administrator, I oversee NOAA, a bureau within the Department of Commerce. Among other duties, NOAA is responsible for implementing various Federal laws that provide for the conservation and management of protected species and their habitats, including the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1371, *et seq.*, through NMFS, a subunit within NOAA. I possess the requisite statutory authority under sections 103 and 112 of the MMPA, and Department of Commerce Department Organization Order 10-15, to promulgate the Approach Rule as described below. Pursuant to the NOAA Organization Handbook Transmittal No. 61, the authority to perform functions under the MMPA has been redelegated to the Assistant Administrator for NOAA Fisheries; however, I retain the authority to take any action that is redelegated.

Out of an abundance of caution, and to remove any doubt as to its validity, I have independently evaluated the Approach Rule and the basis for adopting it, and I now affirm and ratify the Approach Rule without deference to Assistant Administrator Coit's prior decision. I state that I have knowledge of the contents, purpose, and requirements of the Approach Rule and its rulemaking record. I undertake this action based on my careful review of the Approach Rule, my knowledge of its provisions, and my independent judgment that the Approach Rule was and remains necessary to protect Hawaiian spinner dolphins, a protected species under the MMPA, from illegal "take" by people wishing to closely swim with or approach the species. Pursuant to my authority as the NOAA Administrator, and based on my independent review of the action and the

reasons for taking it, I hereby affirm and ratify the Approach Rule as of September 28, 2021, including all regulatory analysis certifications contained therein.

This action is taken without prejudice to any right to litigate the validity of the Approach Rule as approved and published on September 28, 2021. Nothing in this action is intended to suggest any legal defect or infirmity in the approval or publication of the Approach Rule.

Authority: 16 U.S.C. 1361 *et seq.*

Date: July 8, 2022.

Richard W. Spinrad
Under Secretary of Commerce
for Oceans and Atmosphere
and NOAA Administrator

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